Supreme Court U.S.
FILED
JUL 5 2002
OFFICE OF THE CLERK

No. 01-1229

In the Supreme Court of the United States

PIERCE COUNTY,
Petitioner,
v.
IGNACIO GUILLEN, *ET AL.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF FOR PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 20191
(703) 264-5300

KENNETH S. GELLER
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 8

I. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO ENACT 23 U.S.C. § 409 WITHOUT INFRINGING THE TENTH AMENDMENT 8

A. Commerce Clause 8

B. Spending Clause 11

C. The Tenth Amendment Is No Bar To Section 409 13

II. CONGRESS' AUTHORITY TO ENACT 23 U.S.C. § 409 IS APPLIED IN MANY OTHER FEDERAL STATUTORY SCHEMES 15

A. This Court Has Long Endorsed Federal Statutes Setting Nationwide Tort Standards In Classes Of Cases In State Courts Over Which Congress Has Jurisdiction 15

B. Congress Has Enacted Numerous Statutes Shielding Information From Disclosure In State Courts 17

TABLE OF CONTENTS — Continued

Page

C. Congress Has Recently Enacted, And Is Considering Further, Legislation Preempting State Procedural Rules 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

Alabama Highway Dep't v. *Boone*, No. 90-1412, cert. denied, 502 U.S. 937 (1991) 3

Alden v. *Maine*, 527 U.S. 706 (1999) 14

Central Vermont Ry. Co. v. *White*, 238 U.S. 507 (1915) 15

Crowell v. *Benson*, 285 U.S. 22 (1932) 15

Dice v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) 7, 15-16

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) 7, 15

FERC v. *Mississippi*, 456 U.S. 742 (1982) 8

Hines v. *Davidowitz*, 312 U.S. 53 (1941) 15

Hodel v. *Indiana*, 452 U.S. 314 (1981) 7, 8-9, 10

Louisville & N.R. Co. v. *Grant*, 27 S.W.2d 980 (Ky. 1930) 18

Louisville & N.R. Co. v. *Stephens*, 182 S.W.2d 447 (Ky. 1944) 18

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 10

Nevada v. *Hicks*, 533 U.S. 353 (2001) 15

TABLE OF AUTHORITIES — Continued

Page(s)

New York v. *United States*, 505 U.S. 144 (1992) 7, 13, 14

Printz v. *United States*, 521 U.S. 898 (1997) 7, 13

Reno v. *Condon*, 528 U.S. 141 (2000) 7, 13-14

Robertson v. *Union Pacific R.R. Co.*, 954 F.2d 1433 (8th Cir. 1992) 10

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 16

South Dakota v. *Dole*, 483 U.S. 203 (1987) 7, 11-12

Testa v. *Katt*, 330 U.S. 386 (1947) 13

United States v. *Lopez*, 514 U.S. 549 (1995) 6, 8

United States v. *Smith*, 499 U.S. 160 (1991) 15

Yanick v. *Pennsylvania R. Co.*, 192 F. Supp. 373 (E.D.N.Y. 1961) 18

Constitutional Provisions and Statutes:

U.S. Const., art. I, § 8, cl. 1 ..... *passim*

U.S. Const., art. I, § 8, cl. 3 ..... *passim*

U.S. Const., art. I, § 8, cl. 18 ..... 5, 10

U.S. Const., art. VI, cl. 2 ..... 14, 15

TABLE OF AUTHORITIES — Continued

Page(s)

U.S. Const., amend. X 7, 13, 14

15 U.S.C. § 2055 ..... 1, 17

15 U.S.C. §§ 6601-6617 18

20 U.S.C. § 9007(b)(1) 17

21 U.S.C. § 360i 17

21 U.S.C. §§ 1601-1606 19

23 U.S.C. § 101(b) 8

23 U.S.C. § 121 2

23 U.S.C. § 130 3

23 U.S.C. § 144 3

23 U.S.C. § 152 ..... 3, 4, 5

23 U.S.C. § 158 ..... 11, 12

23 U.S.C. § 402 2

23 U.S.C. § 402(k)(4) 3, 9

23 U.S.C. § 409 ..... *passim*

33 U.S.C. § 930 17

45 U.S.C. §§ 51-60 15-16

TABLE OF AUTHORITIES — Continued

Page(s)

49 U.S.C. § 504 17

49 U.S.C. § 1154 18

49 U.S.C. § 20101 17

49 U.S.C. § 20703(c) 17

49 U.S.C. § 20901 17

49 U.S.C. § 20902 17

49 U.S.C. § 20903 17

49 U.S.C. § 47507 17

Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966) 2

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) 18-19

RCW § 47.04.050 12

RCW § 47.04.060 ..... 4, 12

Other Materials:

Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002) 19

H.R. 4600, 107th Cong. (2002) 19

TABLE OF AUTHORITIES — Continued

Page(s)

H.R. Rep. No. 104-246 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522 4

Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998) 19

S. Rep. No. 89-1302 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741 2

Second Annual Report on Highway Safety Improvement Programs, H.R. Doc. No. 94-366 (1976) 3

privilege, the Supreme Court of Washington repudiated this Court's precedents, developed over the last 100 years, affirming congressional authority to enact standards and rules in state court cases falling within Congress' Article I jurisdiction. In addition, the Washington court's sweeping assertion of "state sovereignty" would unduly restrict congressional jurisdiction over issues of surpassing national importance, including pending civil justice and healthcare reform measures in which PLAC's members have a substantial interest. Accordingly, PLAC submits this brief to assist the Court in defining the constitutional scope of congressional authority to include the enactment of 23 U.S.C. § 409.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case involves congressional jurisdiction over a significant issue of national transportation policy: highway safety. Since Congress enacted the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966), the federal government and participating States have established a comprehensive highway safety program pursuant to standards issued by the U.S. Department of Transportation. A key feature of this program is the development and application of standards for data collection and reporting on highway safety. See 23 U.S.C. §§ 402, 409; see also S. Rep. No. 89-1302, at 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741, 2741 (Highway Safety Act requires the federal government "to encourage and assist each of the States in the establishment of a highway safety program * * * [with] provisions for an effective accident record system").

States participate fully in this national highway safety program and receive funding from the federal government to improve the safety of state roads and highways. See 23 U.S.C. § 121. To receive federal funds, however, a State must certify to the Department of Transportation either "that it has in operation a computerized traffic safety recordkeeping system"

or that is has a plan "for establishing and maintaining a computerized traffic safety recordkeeping system." 23 U.S.C. § 402(k)(4).

The requirement that a State gather data identifying and evaluating accident sites and hazardous highway locations as a condition of receiving federal funds met initial resistance from States concerned about potential liability. State governments feared "legal actions resulting from accidents at these locations before an improvement c[ould] be made." *Second Annual Report on Highway Safety Improvement Programs*, H.R. Doc. No. 94-366, at 36 (1976). As a result, state and local governments were hesitant to compile the required data because "'acknowledging the existence of hazardous conditions would expose them to liability.'" Pet. Br. 3-4 (citations omitted). As the United States explained, state and local governments were "reluctant to compile detailed and accurate information about highway safety problems if there [wa]s a significant risk that the information w[ould] be used against them in actions for damages." U.S. *Amicus* Br. at 12, *Alabama Highway Dep't* v. *Boone*, No. 90-1412, cert. denied, 502 U.S. 937 (1991); *id.* at 6 (States "will likely be deterred from compiling complete and accurate information").

To address this concern and thereby increase State participation in the national highway safety program and improve the completeness and accuracy of highway safety data, Congress in 1987 enacted 23 U.S.C. § 409, which shields from disclosure the data and reports generated as a condition of receiving federal highway safety funds. The statute has been amended to expand its scope, and in its current form provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data complied or collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway/highway crossings, pursuant to Sections 130, 144, and 152 of this title, or for the purpose

> of developing any highway safety construction improvement project, which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in federal or state court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Congress amended Section 409 in 1995 to "clarify that data 'collected' for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings." H.R. Rep. No. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522, 551. The provision thus includes within its scope "raw data collected prior to being made part of any formal or bound report." *Ibid.*

2. The State of Washington participates in the federal highway safety program. The Washington legislature has expressly authorized the State Department of Transportation to enter into agreements with the U.S. Department of Transportation to receive federal funds for highway improvements in the State. Pet. Br. 3; RCW § 47.04.060. And, like other States nationwide, Washington has incorporated the federal standards for collecting, recording, and reporting accident data and highway safety information "into its Administrative Code and thereby dictated procedures for all subsequent accident reports in the state." Pet. Br. 2.

Respondents in this case seek accident reports and other data compiled by the State of Washington about an intersection in Pierce County. Respondents are the guardians of four minor children who were injured in an automobile accident at the Pierce County intersection in 1996. At the time of the accident, the intersection was the subject of an application "for federal hazard elimination funds under 23 U.S.C. Section 152." Pet. Br. 7. The application "was supported by the required data from accident reports, collision diagrams and other similar material" that were collected and compiled in conformance with federal

standards. *Ibid.* The application was "submitted to and administered by the Washington State Department of Transportation" and was granted three weeks after the accident. *Id.* at 8.

Respondents sued Pierce County in state court and sought an order compelling production of the accident reports and other data about the intersection used in connection with the application for federal funds. The County invoked 23 U.S.C. § 409, which as described above protects from discovery or admission into evidence in state court proceedings any documents or data "compiled or collected" by any state or local government agency under various federal highway safety and improvement programs. The "Hazard elimination program," 23 U.S.C. § 152, under which the County applied for funds to improve the intersection where the accident occurred, obliges participating States to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations."

The Supreme Court of Washington affirmed an order requiring that the data and information compiled by the County be produced despite the federal privilege against production. The court concluded that Section 409 "violates the United States Constitution's federalist design * * * insofar as it makes state and local traffic and accident materials and data nondiscoverable and inadmissible in state and local courts, simply because they are *also* 'collected' and used for federal purposes." Pet. App. 4-5. The court held that neither the Spending Clause, the Commerce Clause, nor the Necessary and Proper Clause empowered Congress to create a privilege that covers preexisting materials that are compiled in connection with a federal highway safety program. According to the Washington Supreme Court, "only materials and data originally *created* for the statutorily identified federal purposes are

lawfully covered by the federal privilege and, thus, exempt from public disclosure * * *." *Ibid.* [2]

3. The Washington Supreme Court plainly erred in holding that Congress may not bar the discovery or admission into evidence in state court proceedings of information compiled by a local government in connection with a national highway safety program in which the State's executive and legislature have freely agreed to participate and have received substantial funds from the federal government to improve highway safety in the State.

Congress has a valid interest in protecting from disclosure accident report data created and compiled by state and local governments in connection with a program that seeks to improve the safety of a key "channel" of interstate commerce — our Nation's roads and highways. *United States* v. *Lopez*, 514 U.S. 549, 559 (1995). Without the shield in Section 409, state and local governments reasonably feared that such data would be used against them in litigation. Hence, either the information would not be collected or its reliability would be suspect.

Congress had at least two sources of authority to enact a provision that addressed this problem. First, under the Commerce Clause, Congress may regulate the disclosure of data generated in connection with a federal highway safety program that, as the Washington Supreme Court acknowledged, has a substantial relationship to interstate commerce. Pet. App. 103-104 ("Certainly, a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole'") (citation omitted). Indeed, this federal program regulates a basic "channel" of interstate commerce, and Section 409 is an

[2] The Washington Supreme Court also held that respondents had standing to challenge the constitutionality of Section 409. Pet. App. 75-78.

"integral part" of the program aimed at developing reliable information on highway safety. *Hodel* v. *Indiana*, 452 U.S. 314, 328 (1981).

Second, under the Spending Clause, Congress offered the States financial incentives and benefits to participate in the federal highway safety program. One of the conditions of participation in the program was the collection of accident reporting data to identify dangerous roads and intersections. The bar on disclosure of this information is "reasonably related" to the federal program, because it is necessary to encourage state and local governments to participate and collect accurate and comprehensive information. See *South Dakota* v. *Dole*, 483 U.S. 203, 207-208 (1987).

This Court's recent cases on federalism and the Tenth Amendment, see *Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992), cast no doubt on the constitutionality of Section 409. This statutory provision imposes no obligation on the State of Washington to regulate its citizens or on the State legislature to enact legislation. Section 409, which was adopted to accommodate the interests of the States participating in the federal highway safety program, acts only to bar information from being disclosed in court. It "does not require the States in their sovereign capacity to regulate their own citizens." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000).

Indeed, Congress' enactment of Section 409 is entirely consistent with the many federal statutes setting nationwide standards for certain classes of state tort cases — the constitutionality of which this Court has long affirmed. See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (Price-Anderson Act); *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (Federal Employer's Liability Act).

ARGUMENT

I. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO ENACT 23 U.S.C. § 409 WITHOUT INFRINGING THE TENTH AMENDMENT

A. Commerce Clause.

As one of the principal "channels of interstate commerce," *Lopez*, 514 U.S. at 558-559, the Nation's highways are clearly subject to regulation by Congress under the Commerce Clause. See 23 U.S.C. § 101(b) (it is "in the national interest to accelerate the construction of the Federal-aid highway systems, including the Dwight D. Eisenhower System of Interstate and Defense Highways").

Although the Washington Supreme Court acknowledged Congress' jurisdiction over the "Federal-aid highway system," the court concluded that Section 409 "cannot reasonably be characterized as an 'integral part'" of Congress' regulation of this system. Pet. App. 104-106. The court "fail[ed] to see how those vital federal purposes are reasonably served by * * * barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created." *Ibid.*

The standard for evaluating whether Section 409 is constitutional under the Commerce Clause is whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *FERC* v. *Mississippi*, 456 U.S. 742, 754 (1982). Congressional legislation enacted under authority of the Commerce Clause "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel*, 452 U.S. at 331-332. Moreover, it is not necessary to "show[] that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and

that the regulatory scheme when considered as a whole satisfies this test." *Id.* at 329 n.17.

On the question whether Section 409 is an "integral part" of the Federal-aid highway program, the record leaves no room for doubt. Many States would not have participated in the program, or at least the data they produced would not have been as reliable, if Congress had not provided a shield from disclosure for the data compiled in connection with the program. See pages 3-4, *supra*. Section 409 is therefore an "integral part" of the federal highway safety program. Under even the narrowest standard that could be applied, Section 409 serves the federal purpose of enhancing highway safety by promoting the collection and compilation of accurate safety data on which to base transportation policy judgments. See pages 2-3, *supra*.

There is no basis in the text of the statute or its legislative history for the distinction drawn by the Washington Supreme Court between data that "would exist even had a federal safety enhancement program never been created" and data created specifically for the federal program. Pet. App. 105. Indeed, the distinction is illusory because "in Washington, data such as police accident reports contain the information required by state regulations, and those regulations were enacted in *express compliance with the federal highway safety act*." Pet. Br. 34; see, *e.g.*, WAC § 136-28-010.

The entire premise of the federal statute is that the States were *not* collecting complete and accurate data on highway safety and that a congressional remedy was necessary to encourage each State to establish a "computerized traffic safety recordkeeping system." 23 U.S.C. § 402(k)(4). Thus, the data and other information that respondents, and similarly situated plaintiffs, seek would not exist but for the federal highway safety program. And it certainly would not exist in the computerized and easily retrievable form it does today — making for ready access to plaintiffs seeking to impose state or local government liability, which is precisely the problem

Congress sought to address. See *Robertson* v. *Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (Section 409 was designed to "facilitate candor in administrative evaluations of highway safety hazards" and "prohibit federally required record-keeping from being used as a tool in private litigation") (citations omitted).

Congress in Section 409 did not draw the distinction relied upon by the Washington Supreme Court. The federal highway safety program is premised on the notion that *all* accident data compiled for the program must be shielded from disclosure. The purported distinction drawn by the court below thus provides no basis to overcome the presumption of rationality that attaches to Section 409 under the Commerce Clause. See *Hodel*, 452 U.S. at 331-332.

Finally, whether or not Section 409 directly advances the federal purposes animating the highway safety program under the Commerce Clause, the statute can be sustained under the discretion granted to Congress by the Necessary and Proper Clause to carry out its Article I powers. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people"). The statutory goal of collecting and organizing highway safety data for policymakers is plainly within Congress' Commerce Clause powers, and thus "all means," including a shield to protect those data from disclosure in state courts, that "are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Ibid.* The Washington Supreme Court had no basis to second-guess that congressional judgment.

B. Spending Clause.

The spending power of Article I of the Constitution provides an independent basis for sustaining Section 409. Congress may, "through the use of the spending power and the conditional grant of federal funds," achieve "objectives not thought to be within Article I's 'enumerated legislative fields.'" *Dole*, 483 U.S. at 207 (citations omitted).

As the Washington Supreme Court noted, this Court in *Dole* held that another provision of the federal highway safety program, 23 U.S.C. §158, was constitutional, "finding that conditioning receipt of federal highway funds on state enactment of minimum drinking age laws was a proper exercise of Congress' spending power." Pet. App. 85-86. The *Dole* Court suggested, however, that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" 483 U.S. at 207 (citation omitted).

Focusing on this language, the Washington Supreme Court held that Section 409 is unrelated to the federal interest in the national highway safety program (Pet. App. 92-93):

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, *among other reasons*, pursuant to a federal statute for federal purposes.

In so holding, the court below applied the wrong standard in deciding whether Section 409 is a constitutional exercise of Congress' spending power — focusing on whether a "valid federal interest" is "reasonably served" by Section 409. The only proper inquiry is whether the privilege against disclosing the data compiled or collected for the federal highway safety

program is "unrelated" to that program.[3] As discussed above (at pages 2-4, 9, *supra*), on that issue there can be no doubt. The privilege against disclosure in Section 409 is essential to ensure that the States participate in the federal program and that the data compiled and collected are accurate and complete.

In this case, the condition attached to the receipt of the federal funds benefitted the recipient States by relieving them of the threat of liability posed by production of accident data. By providing that protection, Congress encouraged States to take part in the federal program and to produce reliable safety data. The "condition" in Section 409 is therefore directly "related" to the federal highway safety program and a constitutional exercise of Congress' spending power. At the end of the day, it is for each State to decide whether to accept the conditions attached to federal highway safety funds.[4] There is no unconstitutional imposition on the States by Congress.

---

[3] The test for "relatedness" is not rigorous. In *Dole*, the Court upheld the constitutionality of a condition on federal highway safety funds (23 U.S.C. § 158) that required participating States to adopt a uniform minimum drinking age of 21. 483 U.S. at 211-212. The Court found that the condition was "related to one of the purposes for which highway funds are expended — safe interstate travel," *id.* at 208, even though the provision was vastly "over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways." *Id.* at 214-215 (O'Connor, J., dissenting).

[4] The Washington legislature expressly "assent[ed]" by statute to the "terms and conditions" of the federal highway safety program, RCW 47.04.060, and directed that the State "shall act in the manner provided by state law * * * so far as the same may be consistent with the provisions of * * * acts of Congress." RCW 47.04.050. Thus, as a matter of state law, Washington has adopted the terms and conditions of the federal highway safety program, including the privilege set forth in Section 409.

C. The Tenth Amendment Is No Bar To Section 409.

Citing this Court's recent Tenth Amendment cases, *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), the Washington Supreme Court nonetheless asserted that Section 409 is an unconstitutional violation of "state sovereignty." Pet. App. 108-112. But the Tenth Amendment poses no barrier to Section 409, which creates a federal privilege to shield information in state courts and is applied by state courts as a matter of federal law under the Supremacy Clause. *Testa* v. *Katt*, 330 U.S. 386 (1947).

This Court in *New York* reviewed a federal statute under which "Congress commandeered the state legislative process by requiring a state legislature to enact a particular kind of law." *Condon*, 528 U.S. at 149. "The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162 (citation omitted).

In *Printz*, the Court invalidated a provision of the Brady Act that required "State and local law enforcement officers to conduct background checks on prospective handgun purchasers." 521 U.S. at 902. "The Federal government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935.

Section 409 is fundamentally different from these statutes that encroach on state sovereignty. First, as noted above, the privilege in Section 409 is not mandatory. The States are free to accept or reject it, depending on whether they want federal highway funds. The statutes in *Printz* and *New York* were mandatory directives to the States.

Second, like the Driver's Privacy Protection Act ("DPPA") at issue in *Reno* v. *Condon*, which "regulate[d] the disclosure and resale of personal information contained in the records of

state DMVs," 528 U.S. at 143, Section 409 "does not require the States in their sovereign capacity to regulate their own citizens." *Id.* at 151. In *Condon*, the Court upheld the constitutionality of the DPPA against a Tenth Amendment challenge, finding that the statute only "regulate[d] the States as the owners of data bases." *Ibid.* Section 409 is even less intrusive, giving the States a choice to adopt federal standards governing the collection and disclosure of accident data and information. Moreover, neither the DPPA nor Section 409 requires a state legislature "to enact any laws or regulations," and neither statute requires "state officials to assist in the enforcement of federal statutes regulating private individuals." *Ibid.*

Third, Section 409 is not directed at the actions of state executive officials or legislators; it is simply a federal evidentiary privilege to be applied in state courts by state judges, if the State decides to participate in the federal highway safety program. As this Court held in *Alden* v. *Maine*, 527 U.S. 706, 752 (1999) (citations omitted), "[a]lthough Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs," Congress may "require state courts * * * 'to enforce federal prescriptions, insofar as those prescriptions relate to matters appropriate to the judicial power.'"

The Supremacy Clause requires this result, mandating that the "Laws of the United States * * * Shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. As this Court observed in *New York*, "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." 505 U.S. at 178-179.

Just as the Supremacy Clause preempts state laws that conflict with federal law by "standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 53, 67 (1941), so too state evidentiary rules must give way to the privilege created by Section 409, which is an essential element of the carefully crafted federal highway safety program.

II. CONGRESS' AUTHORITY TO ENACT 23 U.S.C. § 409 IS APPLIED IN MANY OTHER FEDERAL STATUTORY SCHEMES

A. This Court Has Long Endorsed Federal Statutes Setting Nationwide Tort Standards In Classes Of Cases In State Courts Over Which Congress Has Jurisdiction.

Section 409 preempts only a tiny sliver of state law in an exceedingly narrow class of state court cases, yet Congress has cut a much wider swath in other areas of state tort law. For nearly a century, this Court has reviewed and consistently found constitutional the many federal statutes setting nationwide tort standards for certain broad classes of cases brought in state court. See, *e.g.*, *Duke Power*, 438 U.S. at 84 (Price-Anderson Act); *Dice*, 342 U.S. at 361 (Federal Employer's Liability Act); *Crowell* v. *Benson*, 285 U.S. 22, 47 (1932) (Longshoremen's and Harbor Workers' Compensation Act); see also *Nevada* v. *Hicks*, 533 U.S. 353, 368 (2001) (comparing the Federal Employees Liability Reform and Tort Compensation Act of 1988 with the Price-Anderson Act); *United States* v. *Smith*, 499 U.S. 160, 172-173 (1991) (explaining the Federal Employees Liability Reform and Tort Compensation Act of 1988).

This Court has repeatedly upheld the constitutionality of federal preemption of state procedural rules by the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). See *Central Vermont Ry. Co.* v. *White*, 238 U.S. 507, 512 (1915). In *Dice*, 342 U.S. at 361, for example, the Court considered

whether a judge or a jury would decide an issue related to a fraud claim. Ohio procedural rules required the trial judge to decide the issue, but under FELA the plaintiff had a right to a jury trial. *Id.* at 363. This Court held that FELA rather than the state rule applied, because "a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act."*Id.* at 361. Thus, the state court could not apply state procedural law because FELA gave the plaintiff a right to a jury trial, which "play[s] an important part in the federal Act's administration." *Id.* at 362.

Under this Court's decisions, therefore, Congress has the authority to enact legislation preempting state procedural rules in state tort actions, in support of a federal interest. Even if "Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is * * * where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (availability of punitive damages under state law is not in conflict with the federal remedial scheme in the Price-Anderson Act).

In this case, Section 409 preempts generally applicable state rules on discovery and evidence that conflict with the goal of the congressional program of developing reliable statistical data on highway safety nationwide. As described above, disclosure of these data in state courts would discourage state and local governments from producing the information or would make the information less reliable. Therefore, preemption of state disclosure rules directly promotes the federal highway safety program — over which there is unquestioned congressional jurisdiction under the Commerce and Spending Clauses. This Court's many decisions affirming the authority of Congress to legislate broad tort rules applicable in state court necessarily endorse the far narrower provision in this case.

B. Congress Has Enacted Numerous Statutes Shielding Information From Disclosure In State Courts.

Following this Court's precedents, Congress has exercised its authority to enact numerous discovery rules similar to Section 409 that limit or regulate disclosure in state courts. See, *e.g.*, 20 U.S.C. § 9007(b)(1) (prohibiting disclosure in "any action, suit or other judicial or administrative proceeding" of any "individually identifiable information" collected as part of a program on national education statistics); 49 U.S.C. § 504 (excluding from discovery any reports on accidents involving motor carriers); 49 U.S.C. § 47507 (limiting admission into evidence of noise exposure data submitted to the Secretary of Transportation); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 930 ("Any report * * * [regarding injury or death] shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made"); Consumer Product Safety Act. 15 U.S.C. § 2055 (limiting discovery of consumer product safety reports); 21 U.S.C. § 360i (limiting discovery of medical device user facility reports).

There has been a particularly strong tradition limiting disclosure of information in pursuit of federal safety policies in the railroad industry. For example, Congress has restricted discovery of accident reports filed by railroads to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. As part of this program, "[n]o part of an accident or incident report filed by a railroad carrier under section 20901 of this title or made by the Secretary of Transportation under section 20902 of this title may be used in a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C. § 20903. See also 49 U.S.C. § 20703(c) (excluding from discovery in state courts investigatory reports related to railroad accidents). "The purpose of the act in requiring a monthly report of accidents to be submitted to the Interstate Commerce Commission [now the Secretary of Transportation] was to afford the [Secretary] an

opportunity to investigate such accidents, and no doubt the admissions of the reports as evidence was prohibited in order to encourage prompt and full reports of all accidents resulting in injury to persons." *Louisville & N.R. Co.* v. *Grant*, 27 S.W.2d 980, 984 (Ky. 1930) (construing an earlier statute with substantially similar language, 45 U.S.C. § 41 (1910)); See *Yanick* v. *Pennsylvania R. Co.*, 192 F. Supp. 373, 377 (E.D.N.Y. 1961) (the statute encourages railroads to investigate accidents by eliminating the threat that the data collected will be used against them at trial); *Louisville & N.R. Co.* v. *Stephens*, 182 S.W.2d 447, 457 (Ky. 1944) ("It is expressly provided by the statute that reports of accidents to the [Secretary of Transportation] shall not be admitted in evidence for any purpose in any action for damages growing out of any matter mentioned therein.").

Yet another federal statute limits discovery of National Transportation Safety Board investigations of commercial aircraft accidents, including cockpit and surface vehicle recordings and transcripts, as well as reports related to the accident. See 49 U.S.C. § 1154 ("No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.").

C. Congress Has Recently Enacted, And Is Considering Further, Legislation Preempting State Procedural Rules.

In light of the foregoing precedents, Congress has recently enacted several statutes — and is currently considering a number of other initiatives — that depend on its ability to preempt state court procedural rules when necessary to achieve an important federal objective. For example, the Y2K Act of 1999, 15 U.S.C. §§ 6601-6617, applies federal pleading requirements, notice of claims provisions, and burdens of proof in civil actions in state court based on Y2K failures. See also Securities Litigation Uniform Standards Act of 1998, Pub. L.

No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.) (prohibiting certain actions from proceeding as class actions and authorizing federal courts to stay discovery in state courts in certain cases); Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1601-1606 (regulating motions to dismiss and for summary judgment in certain classes of state court litigation).

The current Congress is now considering the Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002), which would "amend the procedures that apply to consideration of interstate class actions." The bill provides, among other things, for procedural requirements for any settlement in "[a]ny court with jurisdiction over a plaintiff class action," including state courts. *Ibid.* In addition, several health care reform proposals, see, *e.g.*, H.R. 4600, 107th Cong. (2002), address the evidence that may be introduced in any health care related lawsuit, including suits arising in state courts.[5] Many aspects of these important federal legislative proposals would be cast into doubt by the expansive view of "state sovereignty" adopted by the court below.

* * * * *

The minimal intrusion of Section 409 into the realm of state procedure and evidence to support an important federal safety program — over which Congress has, as all concede, Article I jurisdiction — is not unconstitutional. All of the foregoing legislative programs, including the longstanding tort statutes whose constitutionality has been sustained by this Court and the numerous limitations on disclosures related to safety, support the assertion of congressional authority in this case.

Untethered assertions of "state sovereignty" cannot undermine Section 409. The State of Washington agreed to

---

[5] See also Product Liability Reform Act of 1998, S. 2236, 105th Cong. (1998) (bill proposed to regulate statutes of limitations and repose in certain product liability actions arising under state law).

participate in the federal highway safety program, and Congress adopted Section 409 to accommodate the interest of the States in avoiding public disclosure of the information sought by the federal government. No state sovereignty has been impugned. If Congress cannot make this modest alteration of state procedure — to *benefit* the States at their *request* — then many other federal statutes, including some whose constitutionality has been upheld by this Court, would be subject to the same challenge. The Constitution neither compels nor tolerates that result.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted.

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Suite 510
Reston, Virginia 20191
(703) 264-5300

KENNETH S. GELLER
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

JULY 2002

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Allegiance Healthcare Corporation
Altec Industries
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Ansell Healthcare, Inc.
Appleton Papers, Inc.
Aventis Pharmaceuticals Inc.
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Bombardier Recreational Products
BP Amoco Corporation
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Meyers Squibb Company
Brown and Williamson Tobacco
Brown-Forman Corporation
Brunswick Corporation
Caterpillar Inc.
Centerpulse USA Inc.
Chevron Corporation
Compaq
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation

Dana Corporation
Deere & Company
E&J Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
ExxonMobil Corporation
FMC Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
GlaxoSmithKline
GLOCK, Inc.
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation, Gas & Fluid Control Group
Honda North America, Inc.
Hyundai Motor America
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls Inc.
Joy Global Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Holdings, Inc.
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.

Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R&D of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
Otis Elevator Company
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Philip Morris Companies Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Sears, Roebuck and Co.
Shell Oil Company
Siemans Corporation
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Sunbeam Corporation
Synthes (U.S.A.)
Textron Inc.
The Boeing Company
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company

The Proctor & Gamble Company
The Raymond Corporation
The Sherwin-Williams Company
The Toro Company
Thomas Built Buses, Inc.
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Whirlpool Corporation
Wilbur-Ellis Company
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.